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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIFFANY NICOLE TILLEY,)	1:08-CV-01135 0WW JMD HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION
)	DISMISSING PETITION FOR WRIT OF
v.)	HABEAS CORPUS
)	
TINA HORNBEAK,)	
)	
Respondent.)	

Petitioner Tiffany Nicole Tilley (“Petitioner”) is a State prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation pursuant to a guilty plea on August 24, 2006, for second degree robbery (Cal. Penal Code § 212.5(c)). (Answer Ex. 1, Reporter’s Transcript of Plea Hearing). Petitioner also admitted that she had served a prior prison term (Cal. Penal Code § 667.5(b)). (Pet. at 2). On September 22, 2006, the trial court imposed a term of six years consisting of a five year upper term for the substantive offense and a one year sentence enhancement. (Answer Ex. 1, Reporter’s Transcript of Sentencing)..

Petitioner did not directly appeal her sentence; rather Petitioner pursued collateral relief in the State courts. Petitioner submitted a petition for writ of habeas corpus to Kern County Superior Court on July 31, 2007. (Lod. Doc. 1 at 1). The petition was denied on September 24, 2007. (Id).

1 Petitioner then submitted a petition for writ of habeas corpus to the California Court of
2 Appeal on November 20, 2007.¹ (Lod. Doc. 2). The petition was denied on December 6, 2007.
3 (Lod. Doc. 3).

4 Petitioner subsequently filed a petition for writ of habeas corpus in the California Supreme
5 Court on February 8, 2008. (Lod. Doc. 4). The California Supreme Court denied the petition on
6 July 9, 2008. (Lod. Doc. 5).

7 On July 21, 2008, Petitioner filed the instant federal petition for writ of habeas corpus. (Court
8 Doc. 1).

9 Respondent filed an answer, responding to the allegations set forth in the petition, on
10 February 10, 2009. Respondent argues that the petition is untimely filed. (Answer as 1).

11 DISCUSSION

12 I. Limitation Period for Filing a Petition for Writ of Habeas Corpus

13 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
14 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for writ of
15 habeas corpus filed after the date of its enactment. *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997);
16 *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997) (*en banc*). In this case, the petition was filed
17 in 2008, and is therefore subject to the provisions of the AEDPA. The AEDPA imposes a one-year
18 period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus. 28
19 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)(1) states:

20 A 1-year period of limitation shall apply to an application for a writ of habeas
21 corpus by a person in custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of –

22 (A) the date on which the judgment became final by the conclusion of direct
23 review or the expiration of the time for seeking such review;

24 (B) the date on which the impediment to filing an application created by
25 State action in violation of the Constitution or laws of the United States is
removed, if the applicant was prevented from filing by such State action;

26 ¹In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the United States Supreme Court held that a *pro se* habeas
27 petitioner’s notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the
28 date of its receipt by the court clerk. The Ninth Circuit has applied the rule to assess the timeliness of federal habeas filings
under the AEDPA limitations period. *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001) (citing *Lack*, 487 U.S. at 276).
Therefore, under the mailbox rule, the Court deems the documents as filed on the date Petitioner has signed them.

1 (C) the date on which the constitutional right asserted was initially recognized
2 by the Supreme Court, if the right has been newly recognized by the Supreme
Court and made retroactively applicable to cases on collateral review; or

3 (D) the date on which the factual predicate of the claim or claims presented
4 could have been discovered through the exercise of due diligence.

5 In most cases, the limitations period begins running on the date that the petitioner's direct
6 review became final. *See* 28 U.S.C. § 2244(d)(1)(A). As noted by Respondent, Petitioner did not
7 pursue an appeal of her sentence; thus, Petitioner's conviction became final 60 days after the
8 judgement. *See* Cal. R. Ct. 8.308(a) (formerly numbered as Cal. R. Ct. 30.1(a)). Thus, Petitioner's
9 conviction became final, and the one year statute of limitations period began running, on November
10 21, 2006, 60 days after the judgement on September 22, 2006. Petitioner filed her petition for writ of
11 habeas corpus on July 21, 2008, at which point 608 days had elapsed from the time Petitioner's
12 conviction became final.

13 **A. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

14 Petitioner filed petitions for writ of habeas corpus in the Kern County Superior Court, the
15 California Court of Appeal, and the California Supreme Court. AEDPA requires that "[t]he time
16 during which a properly filed application for State post-conviction of other collateral review with
17 respect to the pertinent judgement or claim is pending shall not be counted toward any period of
18 limitations..." 28 U.S.C. § 2244(d)(2). In *Carey v. Saffold*, 536 U.S. 214, 215 (2002), the United
19 States Supreme Court held the statute of limitations is tolled where a petitioner is properly pursuing
20 post-conviction relief, and the period is tolled during the intervals between one State court's
21 disposition of a habeas petition and the filing of a habeas petition at the next level of the State court
22 system. *See also Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999); *Welch v. Newland*, 267 F.3d
23 1013, 1016 (9th Cir. 2001) ("tolled period includes intervals between the disposition of a state court
24 petition and the filing of a subsequent petition at the next state appellate level"); *Patterson v.*
25 *Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001) (stating that the "AEDPA's one-year grace period is
26 tolled during the pendency of properly filed state petitions challenging the judgment or claim at
27 issue."); *cf. Dils v. Small*, 260 F.3d 984, 986 (9th Cir. 2001) (Court found no tolling between
28 consecutive filings at the same level).

1 The limitation period is tolled while a “properly filed application for state post-conviction or
2 other collateral review with respect to the pertinent judgment or claim is pending.” *Pace v.*
3 *DiGuglielmo*, 544 U.S. 408, 410 (2005). Thus, “[a] state post conviction petition rejected by the
4 state court as untimely” cannot be considered “properly filed.” *Id.* Here, Respondent contends that
5 the petition for writ of habeas corpus filed in the California Supreme Court does not fall under this
6 subsection as it was not properly filed. Specifically, Respondent argues that the sixty-four days in
7 which Petitioner waited to file the petition with the California Supreme Court constituted an
8 unreasonably long delay.² The Court notes that there is no evidence before this Court that the
9 California Supreme Court explicitly found the petition untimely.

10 Respondent relies on the United States Supreme Court’s decision in *Evans v. Chavis*, 546
11 U.S. 189, 193 (2006) to argue that the delay was unreasonable. In *Evans v. Chavis*, the Supreme
12 Court directed that a federal court must determine whether a subsequent petition was unreasonably
13 delayed where the time between the filing the subsequent petition and denial in the previous level
14 exceeded thirty to sixty days. Thus, a federal court must examine the delay and itself determine
15 whether the State courts would have held on the issue of timeliness. *Id.* at 198. The denial from the
16 California Court of Appeal was issued on December 6, 2007. Petitioner filed her petition on
17 February 8, 2009, a total of sixty-four days from the denial. The Court finds that this period would
18 not have been found by the State court to have constituted an unreasonable delay. Thus, the period
19 in which the petition was pending before the California Supreme Court is not counted towards the
20 statute of limitations period.

21 A total of 226 days are not counted for the purposes of determining the limitations period
22 under subsection (d)(2) of Title 28, United States Code section 2244. That period consists of the
23 following:

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26 ²Respondent also argues that the date in which Petitioner filed the petition in the California Supreme Court should
27 be listed as February 19, 2008—the date the petition was actually filed with the State high court. The Court notes that
28 untimeliness is an affirmative defense. As Respondent has produced no evidence to prove that Petitioner did not submit the
petition to the prison authorities for mailing on the day listed as the date of service, the Court finds that the petition was filed
on February 8, 2008.

1 A total of 58 days, from July 28, 2007 until September 24, 2007, during which
2 Petitioner's request for collateral relief was pending in the Kern County Superior Court.

3 A total of 16 days, from November 20, 2007 until December 6, 2007, during which
4 Petitioner's request for collateral relief was pending in the California Court of Appeal.

5 A total of 152 days, from February 8, 2008, until July 9, 2008, during which
6 Petitioner's request for collateral relief was pending in the California Supreme Court.

7 Consequently, a total of 382 days are left from the original 608 days that elapsed from the
8 filing of the federal habeas petition and the final conviction. Thus, Petitioner has exceeded the one
9 year statute of limitations period under AEDPA.

10 **B. Equitable Tolling**

11 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1) that
12 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
13 way." *Pace*, 544 U.S. at 418; *see also Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96
14 (1990); *Calderon v. U.S. Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (*citing Alvarez-*
15 *Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)). Petitioner bears the burden of alleging
16 facts that would give rise to tolling. *Pace*, 544 U.S. at 418; *Smith v. Duncan*, 297 F.3d 809 (9th Cir.
17 2002); *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993).

18 Currently, Petitioner does not allege that the limitations period is subject to equitable tolling
19 nor does she provide any evidence that would support such a conclusion. As stated earlier, Petitioner
20 bears the burden of alleging such facts. As there are no facts supporting a claim of equitable tolling,
21 the Court deems the petition for writ of habeas corpus as untimely and recommends that the petition
22 should be dismissed.³

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27 ³Respondent asserts alternatively that Petitioner has failed to exhaust certain claims she raised in the instant
28 action—namely, the Eight Amendment claim, the factual basis claim, and the claim of ineffective assistance of counsel.
(Answer at 12-13). As the Court is dismissing the action as untimely, the Court need not reach the merits of this claim.

